

CHAPTER 2

NATIONAL ENVIRONMENTAL POLICY ACT AND RELATED PROCEDURES

A NATIONAL ENVIRONMENTAL POLICY

The 1960's brought about an increased public awareness and concern for the pressure that human development was placing on the condition of the environment. In response to this, Congress passed and President Nixon signed into law, the National Environmental Policy Act of 1969 (NEPA). The Act, considered to be the basic "National Charter" for protection of the environment, included three major goals that have influenced the Federal Highway Administration (FHWA) and all Federal agencies. The NEPA:

- set national environmental policy,
- established a basis for environmental impact statements (EISs), and
- created the Council on Environmental Quality (CEQ).

NEPA requires that, to the extent possible, the policies, regulations, and laws of the Federal Government be interpreted and administered in accordance with NEPA. It also requires Federal agencies to use an interdisciplinary approach in planning and decision-making for actions that impact the environment. Finally, NEPA requires the preparation of an Environmental Impact Statement (EIS) on all major Federal actions *significantly* affecting the natural or human environment.

NEPA called for the creation of the CEQ. The CEQ is an office within the Executive Office of the President and has four main functions:

- develop environmental policies for the nation,
- monitor environmental quality,
- prepare an annual environmental quality report, and
- monitor Federal actions.

NEPA requires Federal agencies to use an interdisciplinary approach in planning and decision-making for actions that impact the environment.

CEQ Regulations for Implementing NEPA can be found on the World Wide Web (WWW) at:

http://ceq.eh.doe.gov/nepa/regs/ceq/toc_ceq.htm

The scoping process is intended to get the lead and cooperating agencies and other interested groups together early in the project development process to determine the scope of the issues to be addressed, and identify any important issues related to the proposed action.

COUNCIL ON ENVIRONMENTAL QUALITY REGULATIONS

In 1970, CEQ issued guidelines for the preparation of environmental documents. The FHWA prepared a policy directive in response to those guidelines, as did some other Federal agencies. The CEQ monitored Federal environmental processing of all the agencies, and found that EISs were too long with less important issues being discussed at great length, that there was poor or no early coordination, and that the process led to unnecessary delays caused by confusion over differing terminology and procedures among Federal agencies. To remedy these problems, President Carter issued Executive Order (EO) 11991 in May 1977. The key provision of the EO was that CEQ could issue mandatory regulations, not just guidelines, for implementing the provisions of NEPA consistently throughout the Federal Government. The result was the CEQ regulations for "Implementing the Provisions of the National Environmental Policy Act," 40 CFR Parts 1500-1508.

The principal goals of the CEQ regulations are to reduce paperwork and delays, and to produce better environmental decisions. The regulations focus on four key areas:

- early coordination,
- uniform processing options for all agencies,
- completing the environmental process, and
- faster and better processing.

EARLY COORDINATION

To improve early coordination, the CEQ regulations introduced the concept of "lead agency" and "cooperating agency". The lead agency is responsible for the Federal action and supervising the preparation of

the environmental document. Cooperating agencies are those agencies specifically requested by the lead agency to assist during the environmental process. Cooperating agencies are those Federal agencies with special expertise (e.g. US Fish and Wildlife Service, National Marine Fisheries Service) or jurisdiction by law (e.g. US Army Corps of Engineers (COE) the US Coast Guard (USCG) when a permit is necessary, the US Fish and Wildlife Service for involvement with federally-listed threatened or endangered species or habitat, the National Marine Fisheries Service for involvement with designated Essential Fish Habitat), or other Federal agencies where a land transfer from that agency is needed. The CEQ also instituted a scoping process which was intended to get the lead and cooperating agencies and other interested groups together early in the project development process to determine the scope of the issues to be addressed, and identify any important issues related to the proposed action. By properly using the early coordination process, agencies could avoid conflicts later, and could assure the full input from the various interests.

UNIFORM PROCESSING

The CEQ regulations also established uniform processing options for all Federal agencies. These options are the Categorical Exclusion (CE), the Environmental Assessment (EA), and the Environmental Impact Statement (EIS).

COMPLETING THE ENVIRONMENTAL PROCESS

In order to aid in completing the process, CEQ introduced two specific formal decision documents:

- Finding of No Significant Impact (FONSI) - A document prepared by a Federal agency briefly presenting the reasons why an action/project will not have a significant effect on the natural or human environment and for which an environment impact statement will not be prepared.
- Record of Decision (ROD) - A document prepared by a Federal agency that presents the basis for selecting and approving a specific transportation proposal that has been evaluated through various environmental and engineering studies.

FEDERAL HIGHWAY ADMINISTRATION AND NEPA

The CEQ regulations provided the basic framework for all Federal agencies to follow in complying with the law. For transportation decision-making, FHWA adopted a policy of managing the NEPA process as an "umbrella" under which all other environmental laws, Executive Orders, and regulations are considered prior to the final decision of a proposed action or project. This FHWA regulation is "Environmental Impact and Related Procedures," 23 CFR 771, effective November 28, 1987.

The FHWA NEPA project development process includes and considers the input of other agencies and the public through established coordination and a public involvement process.

The FHWA NEPA project development process is a balanced approach to transportation decision-making that takes into



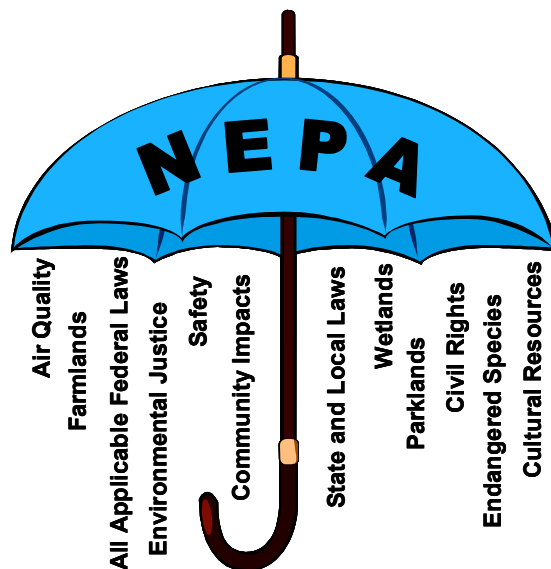
Achieving NEPA's goals entails assessing a potential project in light of all other social, economic, and environmental requirements reaching a single decision that satisfies multiple concerns in the best overall public interest.

account the potential impacts on the human and natural resources and the public's need for safe and efficient transportation improvements.

It is FHWA's policy that all environmental protection requirements and enhancement goals be completed as part of a coordinated review process that includes and considers the input of other agencies and the public through established coordination and a public involvement process.

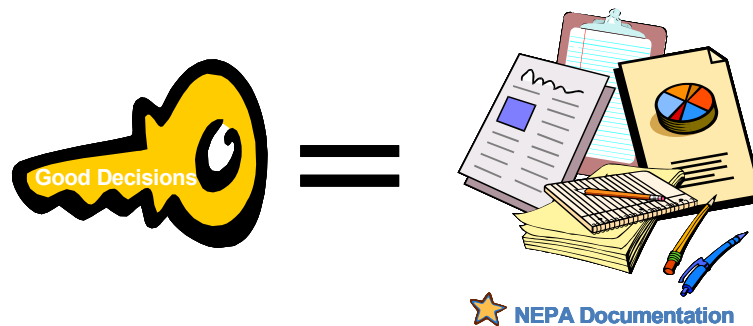
ENVIRONMENTAL DOCUMENTATION

Achieving NEPA's goals entails assessing a potential project in light of all other social, economic, and environmental requirements. NEPA acts as an "umbrella" under which those laws, Executive Orders, and regulations are administered. Concluding the NEPA process therefore means reaching a single decision that satisfies multiple concerns in the best overall interest of the public.



In meeting the requirements of NEPA, government agencies must share the results of their analysis of the effects of projects upon the environment. Good decisions are the objective of the NEPA process, and good NEPA documentation is essential to a broad understanding of the activities and analysis that went into that decision.

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The key to making good decisions rests on good NEPA documentation of activities.

The environmental documentation is to address:

- purpose of and need for the proposed action,
- environmental impacts of the proposed action,
- adverse environmental effects which cannot be avoided should the proposal be implemented,
- alternatives to the proposed action, including the no-build alternative,
- relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
- irreversible and irretrievable commitments of resources that would be involved in the proposed action should it be implemented.



Different kinds of transportation projects will have varying degrees of complexity or potential to affect the environment. The CEQ regulations implementing NEPA identifies three classifications of actions, defining the way that compliance with NEPA is documented in terms of the action's impacts:

- An Environmental Impact Statement (EIS) is prepared for projects where it is known that the action will have a significant effect on the environment.
- Categorical Exclusions (CE) are for actions that do not individually or cumulatively have a significant environmental effect.
- An Environmental Assessment (EA) is prepared for actions in which the significance of the environmental impact is not clearly established.

Although the size and apparent complexity of the three levels of NEPA documentation is quite different, they all serve the same purpose – to achieve NEPA's goals of a collaborative decision making process and ultimately to make the public aware of the rationale behind the transportation decision.

SIGNIFICANCE

Context and Intensity should be considered, and are essential in determining the significance of a project's environmental impacts.

To determine the appropriate class of action and thereby the requisite level of documentation necessary to comply with NEPA, it is essential to understand the term "significance." The CEQ regulations (40 CFR 1508.27) state that two main points should be considered in determining significance: **context** and **intensity**.

Impacts can be considered in the context of society as a whole, the affected region, or locality. In the case of a site-specific action,



significance would usually depend on the effects in the locale rather than in the world as a whole. Both short- and long-term effects are relevant.

For example, filling one acre of a one hundred-acre wetland probably could be considered not significant, but filling one acre of a two-acre wetland may be considered, under certain circumstances, a significant impact. The intensity is the same, but the context is different.

Factors to consider regarding intensity or severity of impacts include:

- impacts that may be both beneficial and adverse
- degree to which the proposed action affects public health or safety
- unique characteristics of the geographical area
- degree to which the effects on the quality of the human environment are likely to be highly controversial
- degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks
- degree to which the action may establish a precedent for future actions with significant effects
- whether the action is related to other actions with individually insignificant but cumulatively significant impacts
- degree to which the action may adversely affect resources listed in or eligible for listing in the National Register of Historic Places
- degree to which the action may adversely affect an endangered or threatened species or its habitat
- whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.

NEPA/SECTION 404 MERGED PROCESS

The NEPA/Section 404 merged process was designed to improve the efficiency of how the FHWA NEPA process works, using early and active interagency coordination to focus efforts on reaching an environmentally sound project.

The NEPA/Section 404 merged process was initiated to streamline project decision-making on Federal-aid Highway Projects. The reason for merging the FHWA NEPA and Section 404 permit processes is to provide the opportunity to expedite project decision-making by executing one overall Federal public interest decision, at one point in time, for a Federal-aid project. Both processes involve evaluation of alternatives and assessment of effect to resources against the need for a project, and officials of all agencies involved recognized the opportunity to avoid duplication and inefficiencies within them.

The NEPA/Section 404 merged process was designed to improve the efficiency of how the FHWA NEPA process works, using early and active interagency coordination to focus efforts on reaching an environmentally sound project. For projects involving dredge/fill operations in waters of the United States including jurisdictional wetlands, the US Army Corps of Engineers is responsible for issuing permits and assessing whether the action is appropriate. The requirements for that permitting process are under Section 404 of the Clean Water Act. Often in securing a 404 permit there can be many federal agencies involved such as the US Army Corps of Engineers, US Fish and Wildlife Service, National Marine Fisheries Service and the Environmental Protection Agency, along with state agencies with delegated federal authority (e.g. Louisiana Department of Natural Resources, Coastal Management Division in designated coastal zones).

In 1985, the FHWA, the US Army Corps of Engineers, the Environmental Protection Agency, the US Fish and Wildlife Service (FWS), and the National Marine Fisheries Services (NMFS) jointly

convened a workgroup to develop guidance entitled "Applying the Section 404 Permit Process to Federal-aid Highway Projects". Better known as the "Red Book," this document provides numerous measures to improve interagency coordination on Federal-aid highway projects, emphasizes innovative and cost-effective approaches, and integrates the NEPA and Section 404 permit processes.

In 1996 the FHWA Region 6, the Environmental Protection Agency Region 6, the US Army Corps of Engineers Lower Mississippi Valley and Southwestern Divisions, the US Fish and Wildlife Service Regions 2 and 4, and the National Marine Fisheries Service Southeast Region entered into an Interagency NEPA and Section 404/10 Concurrent Process Agreement for Transportation Projects that established the framework for the NEPA/Section 404 merged process in Louisiana, Texas, Arkansas, New Mexico, and Oklahoma.

CONTEXT SENSITIVE SOLUTIONS

Context sensitive solutions (CSS) is an element of FHWA's Environmental Stewardship and Streamlining efforts that places preservation of historic, scenic, natural environment, and other community values on an equal basis with mobility, safety, and economics.

Context sensitive solutions (CSS) is an element of FHWA's Environmental Stewardship and Streamlining efforts. CSS considers the total context within which a transportation improvement project will exist. It is a collaborative, interdisciplinary approach that involves all stakeholders to develop a transportation facility that fits its physical setting and preserves scenic, aesthetic, historic, and environmental resources, while maintaining safety and mobility. CSS places preservation of historic,



CSS is an opportunity to connect with the communities and the constituents that we serve.

scenic, natural environment, and other community values on an equal basis with mobility, safety, and economics.

The following are widely accepted principles of CSS.

QUALITIES OF EXCELLENCE IN TRANSPORTATION DESIGN

- The project satisfies the purpose and need as agreed to by a full range of stakeholders. This agreement is forged in the earliest phase of the project and amended as warranted as the project develops.
- The project is a safe facility for both the user and the community.
- The project is in harmony with the community, and it preserves environmental, scenic, aesthetic, historic, and natural resource values of the area (for CSS, determination of context for the project).
- The project exceeds the expectations of both designers and stakeholders and achieves a level of excellence in people's minds.
- The project involves efficient and effective use of the resources (time, budget, community) of all involved parties.
- The project is designed and built with minimal disruption to the community.
- The project is seen as having added lasting value to the community.

CHARACTERISTICS OF THE PROCESS CONTRIBUTING TO EXCELLENCE

- Communication with all stakeholders is open, honest, early, and continuous.



- A multidisciplinary team is established early, with disciplines based on the needs of the specific project, and with the inclusion of the public.
- A full range of stakeholders is involved with transportation officials in the scoping phase. The purposes of the project are clearly defined, and consensus on the scope is forged before proceeding.
- The project development process is tailored to meet the circumstances. This process should examine multiple alternatives that will result in a consensus of approach methods.
- A commitment to the process from top agency officials and local leaders is secured.
- The public involvement process, which includes informal meetings, is tailored to the project.
- The landscape, the community, and valued resources are understood before engineering design is started.
- A full range of tools for communication about project alternatives is used (e.g., visualization).

A transportation facility is an integral part of the community's fabric and it can help define the character of the community or it can destroy it. CSS is an opportunity to connect with the communities and the constituents that DOTD serves.

Section 4(f) of the USDOT Act of 1966 applies to all historic sites, and to publicly owned land of a public park, recreational area, or wildlife and waterfowl refuge.

SECTION 4(F)

Section 4(f) of the USDOT Act of 1966, provides protection to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites.





Section 4(f) applies to [all](#) historic sites, and to publicly owned land of a public park, recreational area, or wildlife and waterfowl refuge. If a governmental body has a proprietary interest in the land (such as fee ownership, drainage easements or wetland easement), it can be considered "publicly-owned." Typically, Section 4(f) does not apply when parks, recreational areas, and wildlife and waterfowl refuges are owned by private institutions and individuals, even if such areas are open to the public. The final applicability of Section 4(f) to a property is always made by FHWA.

Lands protected by Section 4(f) can be used for a transportation project only if:

- there is no prudent and feasible alternative to the use of these resources
- all possible planning has been taken to minimize harm to the resource.

If land protected by Section 4(f) is used, a Section 4(f) evaluation must be prepared following FHWA guidance.

In order to demonstrate that there is no prudent and feasible alternative to the use of Section 4(f) land, the evaluation must address location alternatives and design shifts that avoid the Section 4(f) land and demonstrate that such alternatives result in unique problems. Unique problems are present when there are truly unusual factors or when the costs or community disruption reach extraordinary magnitude.

When a Section 4(f) evaluation is being performed as part of an EIS or EA, the Section 4(f) evaluation is often included as a separate section

of the NEPA document. For Categorical Exclusions or, in certain cases, for EAs and EISs, the Section 4(f) evaluation may be processed as a separate document.

GUIDANCE DOCUMENTS

Guidance for preparing environmental and Section 4(f) documents are contained in the FHWA's Technical Advisory (T6640.8A), "Guidance for Preparing and Processing Environmental and Section 4(f) Documents". Additional direction and guidance in specific areas of environmental concern and consideration are provided in numerous other regulations, Executive Orders, FHWA guidance documents and DOTD policies and publications, many of which are located on the World Wide Web (WWW). Chapter 7 contains a list of federal and state resource agency websites.

DOTD AND THE STAGE 1 ENVIRONMENTAL PROCESS

All projects, regardless of classification (preservation, operations, safety, capacity, or other) and funding source, will be developed and carried forward through the Stage 1 Environmental Process. Projects that are federally funded, or otherwise require a federal action or permit in order to be implemented, will follow a process in accordance with the National Environmental Policy Act (NEPA). Projects developed in accordance with NEPA will result in one of the following types of environmental decision documents:

- Categorical Exclusion (CE)
- Environmental Assessment / Finding of No Significant Impact (EA/FONSI)
- Environmental Impact Statement / Record of Decision (EIS/ROD)



Projects that may not initially be considered for federal funding and do not require a federal action or permit will be developed following a process closely adhering to the NEPA process. As a result, such projects may be eligible for future federal funding at subsequent stages of project development, thereby maximizing funding sources and minimizing delay. Actions normally taken by the lead federal agency under NEPA will be the responsibility of the Assistant Secretary of the Office of Planning and Programming and may be delegated at the Assistant Secretary's discretion. Environmental documentation will be one of the following types:

- Environmental Exclusion (EE)
- Environmental Assessment / Environmental Finding (EA/EF)
- Environmental Impact Statement / Environmental Record (EIS/ER)

The DOTD Program Development and Project Delivery System Manual and the Stage 1 – Planning / Environmental Manual of Standard Practice will be used to guide the development of Stage 1 documentation.